SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1392

STATE OF WASHINGTON,

Petitioner,

—v.—

CHARLES EDWARD LESNICK,

Respondent.

ON CERTIORARI FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION

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Respondent accepts the "Opinions Below", "Jurisdiction", "Constitutional Provisions Involved" and "Statement of the Case" as presented in the Petition for Certiorari.

Questions Presented

The question presented by the State of Washington's Petition for Certiorari is whether police officers may forcibly stop a citizen driving a motor vehicle on a public street, which stop is based solely upon a telephone call from an anonymous person. The caller stated only that there was within the city a described van with a described license plate number pulling a trailer and that the driver of that vehicle was attempting to sell "punchboards" in

the city. The caller remained completely anonymous, refused to identify himself and provided no information as to the source of his knowledge.

History of Proceedings

The petitioner has incorrectly recited the history of the various trial court proceedings and respondent therefore provides the following revised summary.

Charles E. Lesnick, the respondent, was charged on October 26, 1970, with the crime of possession of gambling paraphernalia in Cowlitz County District Court, not a court of record. Thereafter, he filed a motion to suppress the evidence in the case upon the grounds that the evidence was obtained in violation of the Fourth Amendment of the United States Constitution. The motion was granted on December 3, 1970. Petitioner appealed the Order Suppressing Evidence to the Superior Court of the State of Washington for Cowlitz County. After a hearing, the Superior Court, on March 5, 1971, reversed the Order Suppressing Evidence and remanded the case to the Cowlitz County District Court for trial. On April 26, 1971, respondent was tried and convicted of the crime of possession of gambling paraphernalia.

On April 28, 1971, respondent appealed to the Superior Court of the State of Washington for Cowlitz County, and a trial de novo was held on December 7, 1971. The respondent again moved to suppress the evidence upon the basis that there was a violation of the Fourth Amendment of the United States Constitution. By Memorandum Opinion, filed December 20, 1971, the motion to suppress was denied and respondent was convicted of the offense of pos-

session of gambling paraphernalia [Appendix C in *Petition for Certiorari*].

On March 17, 1972, respondent appealed to Division II of the Washington State Court of Appeals. On December 28, 1973, Division II reversed the conviction upon the grounds that respondent's constitutional rights under the Fourth Amendment had been violated [Appendix B in Petition for Certiorari]. Thereafter the State of Washington petitioned Division II for rehearing on modification, which petition was denied on January 31, 1974.

The State of Washington then petitioned the Supreme Court of the State of Washington for review of the decision of Division II of the Washington State Court of Appeals. On March 18, 1974, the petition for review was granted and the case was thereafter argued to the Washington State Supreme Court. On January 7, 1975, the Washington State Supreme Court affirmed the decision of Division II of the Washington State Court of Appeals [Appendix A in Petition for Certiorari]. Thereafter, the State of Washington filed a petition for rehearing with the Washington State Supreme Court, which petition was denied on February 20, 1975. The State of Washington then filed its Petition for Certiorari.

Argument

The argument presented by the State of Washington distorts the holding of the Washington Supreme Court in *State* v. *Lesnick,* 84 Wash.2d 940, 530 P.2d 243 (1975). The petition for certiorari states (p. 6):

> And yet the Supreme Court of the State of Washington has, by its opinion in this case, indicated that

> the Fourth Amendment to the United States Constitution prohibits law enforcement agencies from making an *investigation* of suspected criminal activity if that investigation involves even a minor and temporary infringement of personal liberties, where that investigation is initiated by an anonymous tip.

Of course, the Washington State Supreme Court did not indicate that law enforcement agencies in the State of Washington are prohibited from making investigations based upon anonymous tips. Rather, *Lesnick* held that a police investigation could not include the forcible stop and detaining of a citizen driving an automobile if the only information which the police had to justify the stop was a telephone call from an anonymous tipster who described a van and trailer each with a described license plate number, and stated that the driver of the van was attempting to sell "punchboards".

The reasoning and holding of *State* v. *Lesnick, supra,* depends upon and is supported by *Adams* v. *Williams,* 407 U.S. 143 (1972) and *Terry* v. *Ohio,* 392 U.S. 1 (1968). As noted by Justice Brachtenbach in *State* v. *Lesnick* at 84 Wash.2d 942, this Court in *Terry* and *Adams* "acknowledged that it is necessary to make a delicate balancing of the interest of society in the enforcement of its laws against the individual's right to protection against unreasonable searches and seizures under the Fourth Amendment." In striving to reach such a balance, the United States Supreme Court determined in *Terry* that police may "stop and frisk" a citizen in situations where police officers' personal observations of suspicious activities by the citizen suggest possible criminal activity and justify further police investi-

gation. In *Adams,* the Court determined that police may "approach and frisk" a citizen in situations where another person provides police with information of possible criminal activity, provided the information demonstrates some indicia of reliability regarding the criminal activity.

In the case at bar, the crucial issue is whether the anonymous tip provided the necessary indicia of reliability to justify the forcible stop of respondent's motor vehicle. In *Adams* v. *Williams, supra,* the situation involving a known informer was distinguished from one involving an anonymous telephone tip (407 U.S. at 146):

> Applying these principles [referring to *Terry* v. *Ohio, supra*] to the present case, we believe that Sgt. Connelly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. *This is a stronger case than obtains in the case of an anonymous telephone tip.* [Emphasis added.]

Adams also requires that an "informant's tip must demonstrate some indicia of reliability" (407 U.S. at 147):

> In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. *Some tips, completely lacking in indicia of reliability, would either warrant no*

> *police response or require further investigation before a forcible stop of a suspect would be authorized.* But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response. [Emphasis added.]

Both the Washington State Supreme Court and Division II of the Washington State Court of Appeals failed to find the necessary "indicia of reliability":

> It is difficult to conceive of a tip more "completely lacking in indicia of reliability" than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity. While the police may have a duty to investigate tips which sound reasonable, absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either the presence of criminal activity or that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible. 84 Wash.2d at 944, 10 Wash. App. at 285.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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